Supreme Court, U.S.
FILED
OCT 15 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970
No. 701 Misc.

THOMAS STIMPEL,

Petitioner,

vs.

STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal

BRIEF OF RESPONDENT IN OPPOSITION

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Opinions Below

The opinion of the Court of Appeal, Second Appellate District, Division One (Appendix B of Petition) is reported at 85 Cal. Rptr. 797, 6 Cal. App. 3d 206. The California Supreme Court denied a hearing on June 24, 1970.

The Decision of the California State Personnel Board that is the subject of this litigation is reproduced as Appendix C to the Petition.

Questions Presented

1. Where a person accepts a position with the State government knowing that the regular duties of his position will require Saturday work, and then refuses to work on Saturday, his Sabbath, is the State employer compelled by the Fourteenth Amendment of the Constitution of the United States to order other employees to perform the religious objector's Saturday work schedule?

2. Does a State government, in requiring that an inspector on an important water project conform to the normal work schedule generally applicable to all employees in the particular job classification, deprive the inspector of his constitutional right to freedom of religion, where the schedule conflicts with the religious practice of the inspector.

Statement of the Case

The facts set forth in the Opinion of the Court of Appeal of the State of California, Second Appellate District, Division One, reported at 85 Cal. Rptr. 797, 6 Cal. App. 3d 206, and in the Statement of the Case by petitioner are accurate and will not be repeated herein. The following additional facts are pertinent herein:

When petitioner accepted employment with the State, he knew that construction inspectors were required to be present whenever the private contractors were working on the State's water resources program. (Adm. Tr. Exhs. p. 26; Adm. Tr. p. 40, lines 17-26; p. 41, lines 1-2.) For a substantial period of time, petitioner was retained on the State payroll despite the fact that, in revising the work schedule to accommodate petitioner's Sabbath, a portion of his time was spent on duties other than for which he had been hired. As petitioner testified at the administrative hearing:

"Q. During this period from July 17, 1967 to approximately February 24, 1968, did this issue of your being called upon to work on Saturday ever arise?

A. Yes.

Q. How was it handled?

A. I was relieved from duties as Construction Inspector in the field engineering force and placed on various and sundry duties from sweeping floors to filing plans to office engineering work." (Adm. Tr. p. 4, line 24, to p. 5, line 4.)

Petitioner admitted at the administrative hearing that morale problems were engendered by the special accommodation afforded him while he worked in Northern California. A fellow worker wanted to file a grievance because he was being discriminated against (Adm. Tr. p. 25, lines 10-13), and other people at the project objected violently to continuing to retain petitioner as a Construction Inspector. (Adm. Tr. p. 5, lines 8-13; p. 24, lines 12-16.)

Upon completion of the Northern California phase of the water project, the State Department of Water Resources prepared to lay off personnel unless a position was available on another project. In lieu of a layoff, petitioner accepted a reassignment to Southern California. The letter of reassignment expressly notified petitioner that that "part of the project is presently being worked from Monday through Saturday on a shift basis." (Adm. Tr. Exh. 4.)

The supervising engineers in Southern California desperately needed State inspectors. But they were reluctant to fill an allocated position with a person who would not work on Saturday. (Adm. Tr. p. 6, lines 13-26; p. 7, lines 3-23; p. 23, lines 11-17.)

ARGUMENT

I

The Petition Does Not Present a Substantial Federal Question and the Decision of the California Court of Appeal Is in Accord With the Decisions of the United States Supreme Court

This Honorable Court has recognized that, while public employees have constitutional rights, the government employee bears the burden of "great and total responsibility to his public employer." *Gardner v. Broderick*, 392 U.S. 273, 277-78 (1968).

In *Pickering v. Board of Education*, 391 U.S. 563 (1968), this Honorable Court, while holding that a school teacher had a constitutional right to criticize the School Board in the local paper, stressed that the exercise of First Amendment Rights had not in any way either "impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." (391 U.S. at 572-73.)

The State action in question was merely adhering to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses. *See Walz v. Tax Commission*, 397 U.S. 664, 667-70 (1970).

Governmental neutrality on the Free Exercise Clause avoids a conflict with the Establishment Clause. As the Court stated in *Engel v. Vitale*, 370 U.S. 421, 431 (1962):

> ". . . When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing

officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. . . ."

The employee in *Sherbert v. Verner*, 374 U.S. 398 (1963), was an unemployed worker who inferentially needed unemployment benefits for the necessities of life. A denial of public welfare benefits involves vastly different employee and employer interests than the instant case. Obviously, non-Saturday employment is available. But, of more significance is the fact that in accepting a position knowing that the duties cannot be fully performed, the individual is in effect creating the conflict rather than the State infringing upon constitutional rights.

The State interest in receiving a full week of work, *of the type which the employee was hired to perform*, for a week's pay is a paramount or compelling interest. Rescheduling and compelling other employees to assume the burden of less desirable working days is not an alternative that the State is compelled to perform.

Recent judicial decisions support the premise that neutrality is not discriminatory but rather that unequal treatment would be discriminatory to other employees.

In a recent decision under the Federal Civil Rights Act, 42 U.S.C. § 2000e, the United States Court of Appeals, Sixth Circuit, held that a production employee who refused to work Sunday overtime as required by a collective bargaining agreement on the grounds that Sunday was his religious Sabbath, and was discharged, was not discriminated against be-

cause of his religion. *Dewey v. Reynolds Metals Company*, ... F.2d .... (6th Cir. No. 19746, June 4, 1970, Petition for Rehearing denied, August 11, 1970.)

The Court's opinion provides in part:

> "The reason for Dewey's discharge was not discrimination on account of his religion; it was because he violated the provisions of the collective bargaining agreement entered into by his union with his employer, which provisions were applicable equally to all employees. The violation consisted not only of his refusing to work on Sundays, but also his refusing to arrange for a replacement, which was an alternate procedure. He did arrange for five replacements, but later refused even to do this, claiming that it was a sin. He apparently did not regard it as [sic] sinful for him to collect wages from an employer who was compelled to schedule overtime production in order to meet its contractual commitments and eventually meet its payroll.
>
> "To accede to Dewey's demands would require Reynolds to discriminate against its other employees by requiring them to work on Sundays in the place of Dewey, thereby relieving Dewey of his contractual obligation. This would constitute unequal administration of the collective bargaining agreement among the employees, and could create chaotic peronnel problems and lead to grievances and additional arbitrations. The practice of permitting the employee, rather than the employer, to secure the replacement served to insulate the employer against any charge of unequal naming of replacements."

The Supreme Court of New Jersey recently held that a municipal government acted arbitrarily in failing to charge the "accumulated overtime" amounts of Jewish members of the Police Department who were granted paid time-off for their holy days. The Court in *Ebler v. City of Newark*, 256 A.2d 44 (Sup. Ct. N.J. 1969), also said:

> "We would expect that applications for time off for holy days would be granted as to all faiths to the extent that personnel requirements permit, but it is not to be forgotten that the public safety and welfare must have priority over all else, and that persons who take employment in police and other governmental forces requiring continuous duty to protect the public must be said to have accepted that paramount obligation with all it connotes." (256 A.2d at 46.)

As Judge Learned Hand said in rejecting the contention that a railroad worker, whose religious scruples forbade him from joining a union and he was subsequently discharged when a union shop contract was adopted, had a constitutional right to reinstatement:

> ". . . The First Amendment protects one against action by the government, . . . but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. . . ." *Otten v. Baltimore & O. R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953); *Accord, Gray v. Gulf, Mobile & Ohio Railroad Company*, 302 F. Supp. 292 (D.C. Ala. 1969), *aff'd*, ... F.2d .... (Ct. App. 5th Cir. No. 28202, July 13, 1970); C.C.H. Employment Practices 63 L.C. 9482.

Governmental power may reach peoples' actions found to be in violation of important social duties or subversive of good order even when the actions are demanded by one's religion. Thus, the Sunday closing laws were held valid, although they made the practice of Jewish religious beliefs more expensive, *Braunfeld v. Brown*, 366 U.S. 599, 605-06 (1961), and the polygamy conviction of a member of the Mormon faith was upheld despite the fact that the accepted doctrine of his church then imposed upon its male members the duty to practice polygamy, *Reynolds v. United States*, 98 U.S. 145, 166 (1878).

Respondent submits that where a public employee accepts a governmental position knowing that his work schedule will depend upon the working hours of construction contractors and those working hours in fact entail construction and inspection on the employee's Sabbath, the First and Fourteenth Amendments to the United States Constitution do not compel the public employer to adjust the work schedules to accommodate the particular religious practices of each individual employee.

A constitutional rule requiring accommodation for the varying religious Sabbath and holidays of Jewish, Christian Seven Day Adventist, Worldwide Church of God, or Moslem employees is not only contrary to a compelling State interest viz., that employees in the public payroll perform all the duties for which they are being paid but also, in effect a grant of special privileges to the religious person as against the atheist, agnostic or the person whose religious practices do not conflict with his working hours.

II

The Equal Employment Opportunity Commission Guidelines Do Not Apply to the Instant Case and, in Any Event, Exceed the Constitutional Limitations Upon Public Employers

As petitioner concedes, the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 does not apply to State employment. 42 U.S.C. § 2000e.

An administrative regulation adopted pursuant to a valid federal statute could lawfully impose duties upon employers greater than would be imposed upon the states by the Fourteenth Amendment.

Even assuming that the Civil Rights Act were applicable, a work schedule that applies to all employees equally is not discriminatory despite the fact that its actual effect may result in conflict with the religious beliefs and practice of a particular employee. As the Court of Appeals, Sixth Circuit, in *Dewey v. Reynolds Metals Company, supra,* .... F.2d ...., No. 19746 (on Petition for Rehearing, August 11, 1970, C.C.H. Employment Practices 63 L.C. 9497), said:

> "Nowhere in the legislative history of the Act do we find any Congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another. The requirement of accommodation to religious beliefs is contained only in the EEOC Regulations, which in our judgment are not consistent with the Act.
>
> "The collective bargaining agreement, by which *all* employees were obligated to perform straight time and overtime required of them by the company, was equally and uniformly applied to all of the employees and it discriminated against no one." (Emphasis by Court.)

The logical extension of petitioner's contention would require public and private employers to make exceptions to established and uniformly applied personnel policies in order to accommodate the religious practice of a *potential* employee. *See*, for example, where the New York courts recently held that a bus company could refuse to hire a bearded Moslem (whose religion required the beard) as a baggage clerk where there was a nondiscriminatory policy against beards. *Eastern Greyhound Lines v. New York Div. of H. Rts.*, 311 N.Y.S. 2d 465 (Sup. Ct. App. Div., June 9, 1970).

A closer case would be presented where the employee had no reasonable expectancy in accepting the job that a conflict would arise. The State employer might well be required to justify its action in creating the conflict with the employee's religious practice. But the record in the instant case is analogous to a person accepting a sales position with a retail store knowing that Saturday, her Sabbath, is the busiest day of the week.

Conclusion

Respondent submits that the interest of the State in the efficiency and discipline of the civil service system outweighs any burden upon petitioner's constitutional rights. We submit that a public employer is not required, and indeed may be prohibited, by the Fourteenth Amendment, from altering the work schedule to observe the religious obligations of particular employees.

For the foregoing reasons and authority, respondent State Personnel Board respectfully submits that the petition for writ of certiorari does not present a substantial federal question and the petition should be denied.

Respectfully submitted,

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